COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

CASE NO. 2017-P-1111

JAY PATEL AND DIPIKA, INC.

Plaintiffs-Appellees

V.

LEO MARTIN, SEYMOUR H. MARCUS A/K/A SY MARCUS AND ELLEN RAE MARCUS, TRUSTEE OF THE GROSSMAN MUNROE TRUST

Defendants-Appellants

On Appeal from an Order of the

Superior Court Department of the Trial Court

BRIEF OF DEFENDANTS-APPELLANTS

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I. STATEMENT OF THE ISSUES

The question presented is whether the Superior Court erred in its order (the "Order") entered on June 30, 2017 granting in part and denying in part Appellants' Leo Martin ("Martin"), Sy H. Marcus ("Marcus") and Ellen Rea Marcus, as she is Trustee of the Grossman Munroe Trust (the "Trust") (collectively, "Trust Defendants") motion for a protective order (the "Motion"). The Motion sought to prevent the Trust Defendants' attorney, David C. Levin, from revealing attorney-client privileged communications with the Trust Defendants at Attorney Levin's deposition.

More specifically, in light of Attorney Levin's admission that he provided the Trust Defendants with legal advice, billed the Trust Defendants for his services, the court's conclusion that "Levin served essentially as in-house counsel for Mr. Marcus and his various holdings" for 25 years on countless real estate transactions, and the clients' reasonable belief that Attorney Levin was their attorney, did the court err when it partially denied the Motion and determined that Attorney Levin was not the Trust Defendants' attorney for the purchase and sale agreement at issue?

II. STATEMENT OF THE CASE

1. Background

In September of 2012, the Masonic Temple Association of Quincy, Inc. (the "Masons") entered into a Purchase and Sale Agreement (the "Purchase Agreement") to convert the real estate located at 1170 Hancock Street, Quincy, Massachusetts (the "Temple Property") into two condominium units and to transfer one of the two units to the Trust. (RA 14-15 at ¶7.) Appellees/plaintiffs Jay Patel's and Dipika, Inc.'s (collectively "Patel") case against the Trust Defendants primarily arises from an April 19, 2013 agreement whereby the Trust agreed to assign its rights under the Purchase Agreement to Patel. (RA 15 at ¶8, RA 63.) On September 30, 2013, the Temple Property sustained catastrophic damage as the result of a fire. (RA 19 at ¶21.) After the fire, the Masons "refuse[d] to acknowledge or recognize the [alleged] validity of the [April 19, 2013] assignment" to Patel. (RA 20 at ¶24.) Patel alleges that the Trust failed to obtain required consent for the assignment and, as a result, Patel suffered damages due to his inability to purchase one of the condominium units that were to be created. (RA 22 at ¶33.)

On February 17, 2017, the Trust served Patel with the Motion to prevent Attorney Levin from disclosing his attorney-client communications with the Trust Defendants at Attorney Levin's deposition. (RA 82-83.) Patel opposed the Motion and an initial hearing was held on May 17, 2017. (RA 3, 8, 96-145.) On May 31, 2017, the court ordered an evidentiary hearing. (RA 146-148.) An evidentiary hearing was held on June 27 and 28, 2017. (RA 9, 149-451.) On June 30, 2017, the court heard final arguments and issued the Order, which denied the Motion with respect to the Trust Defendants' communications with Attorney Levin related to the Purchase Agreement and prior to the September 30, 2013 fire, but allowed the Motion as to communications between them after the fire. (RA 9, 520.) The Order was entered on the docket on June 30, 2017. (*Id.*)

The Trust Defendants filed a Single Justice appeal on July 28, 2017 (2017-J-0334). On August 3, 2017, the Single Justice (Sacks, J.) entered an order staying the single justice appeal pending the Trust Defendants' panel appeal. The Single Justice's order stated, in part, "[a]lthough I do not decide the issue, there is some reason to think that a panel

would have jurisdiction of the appeal under the doctrine of present execution."

2. The Trust Defendants' Relationship with Attorney Levin

The judge below concluded that "Levin served essentially as in-house counsel for Mr. Marcus and his various holdings" for 25 years on countless real estate transactions and that Martin served as Marcus's agent. (RA 436:21-437:6.) Based on Marcus' and Martin's relationship and interactions with Attorney Levin, Marcus and Martin believed that all of their communications with Attorney Levin would be held in strict confidence and that their conversations outside the presence of others would be subject to the attorney-client privilege. (RA 84 at ¶2, RA 90 at ¶2, RA 341:9-342:1, 365:11-366:1, 377:5-9.)

Attorney Levin denies he represented the Trust Defendants for the Purchase Agreement and testified that he advised the Trust Defendants that he could not

represent them.[1] (RA 171:5-11.) Attorney Levin testified that he could not represent the Trust Defendants for the Purchase Agreement because of the conflict with his representation of the Masons, an entity that Attorney Levin intended to represent for the Purchase Agreement. (RA 169:4-14, 171:5-11.)

Attorney Levin's representation of both sides of a legal transaction was not a new or alarming practice to the Trust Defendants. Prior to the Purchase Agreement, Attorney Levin had represented both sides of a transaction on other matters involving the Trust Defendants. (RA 331:12-333:1, 363:21-365:10.)

Marcus and Martin are experienced businessman who have been involved in over a hundred real estate acquisitions or sales. (RA 330:25-331:3, 357:5-23.) Marcus and Martin never have entered into a purchase and sale agreement without an attorney guiding them.

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[1] Attorney Levin has no clear recollection of the conversations when he allegedly told the Trust Defendants that he could not represent them for the Purchase Agreement. (RA 171-172.) Attorney Levin also has no contemporaneous documents to reflect any advice that he would not represent the Trust Defendants for the Purchase Agreement. (RA 169:19-170:5, 171:5-22.) Rather, four years after the fact, in 2016, Attorney Levin asked Martin to sign an acknowledgment and waiver, but Martin refused to sign it because it was not truthful. (RA 366:24-368:15, 519.)

(RA 328:7-24, 357:24-358:11.) Attorney Levin represented the Trust Defendants on nearly all of these real estate transaction and Attorney Levin is unaware of the Trust Defendants executing a transaction in excess of a million dollars without legal counsel. (RA 171:1-4, 327:14-328:12, 358:2-25)

3. Attorney Levin's Representation of the Trust Defendants for the Purchase Agreement

In the Spring or early Summer of 2012, Martin sent Attorney Levin a draft Offer to Purchase the Temple Property so that Attorney Levin could prepare a formal purchase and sale agreement. (RA 360:24-361:23, 454-456.) In response, on June 18, 2012, Attorney Levin prepared and emailed Martin an initial draft of the Purchase Agreement. (RA 457-469.) Attorney Levin's first draft of the Purchase Agreement contemplated a purchase price of over a million dollars. (RA 465.) Importantly, the initial draft prepared by Attorney Levin was in a form that Levin said the Masons would not agree to execute. (RA 185:11-188:21.) Hence, it must be that Attorney Levin prepared the first draft of the Purchase Agreement on the Trust Defendants' behalf because it was not in an acceptable form to the Masons.

At some point after Attorney Levin prepared the first draft of the Purchase Agreement, the Trust Defendants and Attorney Levin agreed that another attorney, Marcus's daughter-in-law, Miriam Stramer Marcus ("Attorney Marcus"), would be listed as the Trust's attorney in the Purchase Agreement. (RA 334:14-335:5.) However, Attorney Levin never communicated with Attorney Marcus concerning the Purchase Agreement. (RA 94 at ¶3, 176:5-19.) Instead, Attorney Levin exclusively communicated with Martin and Marcus concerning the Purchase Agreement. (RA 176:5-19.) Martin and Marcus agreed to inserting Attorney Marcus' name in the Purchase Agreement because Attorney Levin asked for another attorney's name for appearance purposes, and advised them that it did not matter that Attorney Marcus had no real estate experience. (RA 334:14-335:5.)

On July 5, 2012, Attorney Levin prepared a second draft of the Purchase Agreement and emailed it to Martin. (RA 470-510.) Attorney Levin inserted Attorney Marcus' name as the Trust's attorney in the second draft of the Purchase Agreement, but Attorney Levin did not send the second draft to Attorney Marcus. (RA 94 at ¶3, 176:5-19, 482.) Attorney Levin's second

draft of the Purchase Agreement again was prepared in a form that he said was not acceptable to Attorney Levin's other client, the Masons. (RA 188:3-11,189:10-18, 190:24-191:25.) Attorney Levin's second draft of the Purchase Agreement was sent to Martin in an email discussing other legal matters for which Attorney Levin unquestionably served as the Trust Defendants' attorney, including a lease for the Trust, the named buyer in the Purchase Agreement. (RA 190:24-191:15, 470-510.)

Attorney Levin sent the first and second drafts of the Purchase Agreement to Martin with the "expectation and the reason for sending it to [the Trust Defendants] were that they'd read it and ask questions or discuss anything that needed to be discussed." (RA 195:4-23.) Attorney Levin expected discussions with Martin and Marcus relating to the drafts of the Purchase Agreement to be "like we had many times before," demonstrating that Attorney Levin treated the Purchase Agreement just like any other transaction in which Attorney "Levin served essentially as in-house counsel" for the Trust Defendants. (RA 199:25-200:4, 436:21-437:6.)

The Trust Defendants sought and obtained legal

advice from Attorney Levin numerous times during the negotiation of the Purchase Agreement, after executing the Purchase Agreement, and for an amendment to the Purchase Agreement. (RA 182:13-184:12, 195:4-196:6, 202:12-203:5, 205:13-24, 215:6-216:4, 218:2-22, 341:9-342:1, 365:11-366:1.) Despite Attorney Levin's denial that he represented the Trust Defendants for the Purchase Agreement, Attorney Levin admitted to meeting alone with and providing legal advice to the Trust Defendants concerning issues in the Purchase Agreement, the terms of the Purchase Agreement and their meanings, how the condominium structure would work, and the time needed to secure permits. (*Id.*) Attorney Levin expected questions from the Trust Defendants and Attorney Levin answered the Trust Defendants' questions relating to the Purchase Agreement. (RA 195:4-196:6, 246:23-247:1.)

Attorney Levin prepared a power of attorney to allow Martin to execute the Purchase Agreement on the Trust's behalf, and Attorney Levin advised Martin of the need for the power of attorney. (RA 510-512.) Attorney Levin also advised the Trust Defendants about certain due diligence deadlines in the Agreement.(RA 514-515.)

Upon completion of the Purchase Agreement, Attorney Levin billed the Trust Defendants a "1/2 fee" for drafting the Purchase Agreement. (RA 513.) Attorney Levin claims that the Trust Defendants agreed to pay for half of the Masons' bill because the Masons are a charitable organization. (RA 207:2-24.) However, Attorney Levin has nothing in writing to support such an assertion and the bill itself does not so indicate. (RA 208:13-25, 513.)

In the Spring of 2013, the Trust Defendants and the Masons discussed amending the Purchase Agreement. On May 3, 2013, Attorney Levin emailed Martin a draft amendment to the Purchase Agreement. (RA 516-518.) Attorney Levin did not communicate with Attorney Marcus about amending the Purchase Agreement. (RA 247:25-248:5.) Attorney Levin asked questions and provided comments to the Trust Defendants during the discussions leading up to the execution of the Purchase Agreement amendment. (RA 246:23-247:1.)

III. STANDARD OF REVIEW

"The focus of appellate review of an interlocutory matter is whether the trial court abused its discretion—that is, whether the court applied proper legal standards and whether the record

discloses reasonable support for its evaluation of factual questions. On appeal from any decision on an attorney-client privilege claim, we review the trial judge's rulings on questions of law de novo." *Clair v. Clair*, 464 Mass. 205, 214 (2013)(internal quotations and citations omitted).

Findings of fact are set aside when they are clearly erroneous. *Springgate v. Sch. Comm. Of Mattapoisett*, 11 Mass.App.Ct. 304, 309 (1981). Findings of fact are clearly erroneous "when there is no evidence to support them or when, 'although there is evidence to support [them], the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *DiGiovanni v. Bd. of Appeals of Rockport*, 19 Mass.App.Ct. 339, 343 (1985) (quoting *Bldg. Inspector of Lancaster v. Sanderson*, 372 Mass. 157, 160-61 (1977)) (brackets in original).

IV. ARGUMENT

A. The Order is Appealable Under the Present Execution Doctrine.

The Trust Defendants Appeal fits within the "present execution" doctrine, which allows an interlocutory appeal to a full Appeals Court panel.

Under the "doctrine of present execution, [ ] an immediate appeal is appropriate [1] where the interlocutory ruling will interfere with rights in a way that cannot be remedied on appeal from the final judgment, and [2] where the matter is 'collateral' to the merits of the controversy." *Marcus v. City of Newton*, 462 Mass. 148, 151-52 (2012)(internal citations and citations omitted).

The first prong of the "present execution" doctrine is met because the Court's finding that Attorney Levin was not the Trust Defendants' attorney for the purchase of the Temple Property cannot be remedied on appeal from a final judgment because the Court's order allows the Trust Defendants' attorney to disclose confidential attorney-client privileged communications that cannot be undone and will irreparably harm the Trust Defendants. *See Preventive Med. Assocs., Inc. v. Com.*, 465 Mass. 810, 823 (2013)(holding that the disclosure of attorney-client privileged communications can be "irreparable" even when disclosure is made by "accident.")[2]

[2] This holding by the Supreme Judicial Court cites with approval to *In re Lott*, 424 F.3d 446, 451-452 (6th Cir. 2005) for the proposition that the disclosure of an attorney-client privilege

The Trust Defendants will be irreparably harmed if the Court refuses to decide the issue now and Attorney Levin is allowed to testify concerning his privileged communications with the Trust Defendants. A new trial would not, and could not, remedy the breach of their privileged communications that become public knowledge as soon as Attorney Levin testifies. Even if a new trial could be ordered at which Attorney Levin would be precluded from testifying concerning privileged communications, Patel would be able to use Attorney Levin's prior testimony to find admissible ways to get into evidence information obtained from Attorney Levin's privileged testimony that never should have been disclosed in the first instance. Because an "an appeal from [the] final disposition of the case would not be likely to protect the [Appellants'] interests, the order is appealable." *Brum v. Town of Dartmouth*, 428 Mass. 684, 687

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communication can be "irreparable." *See Preventive Med. Assocs., Inc.*, 465 Mass. at 823 n.25. Within the same section as the quotation cited by the Supreme Judicial Court, *In re Lott* states, "[i]f [a party] is wrongfully forced to disclose privileged communications, there is no way to cure the harm done to [the disclosing party] or to the privilege itself, even if some of the disclosure's consequences could be remedied on direct appeal." 424 F.3d at 452.

(1999)(internal quotations and citation omitted); *see e.g. Chambers v. Gold Medal Bakery*, Inc., 464 Mass. 383, 389 (2013)(Supreme Judicial Court accepted application for direct appellate review to reverse trial court order that would have forced plaintiffs to produce documents that "implicates privileged or work-product protected material"); *Smaland Beach Ass'n, Inc. v. Genova*, 461 Mass. 214, 219 n.10 (2012) (allowing interlocutory appeal under present execution doctrine for an order disqualifying an attorney).

The second prong of the "present execution" doctrine is met because the issue on appeal - whether Attorney Levin was the Trust Defendants' attorney for the Trust's purchase of the Temple Property - is collateral to Patel's claims against the Trust Defendants. "An issue is collateral to the underlying dispute if it is one that will not have to be considered at trial." *Shapiro v. City of Worcester*, 464 Mass. 261, 265 n.2 (2013)(quoting *Maddocks v. Ricker*, 403 Mass. 592, 596(1988)). All of Patel's claims concern an alleged assignment of the Trust's purchase and sale agreement with the Masons. The disclosure of Attorney Levin's privileged communications with the Trust Defendants is collateral

to Patel's claims because it is not an issue raised in Patel's complaint or an issue that has to be considered at trial to adjudicate Patel's claims.

While the Trust Defendants are aware that the U.S. Supreme Court ruled in *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100, 109 (2009) that attorney-client privilege disclosure orders are not immediately appealable under the Federal Court's collateral order doctrine, Massachusetts' present execution doctrine is not identical and therefore Federal Court law should not be followed. For example, under Massachusetts' present execution doctrine a trial court order disqualifying counsel is immediately appealable under *Borman v. Borman*, 378 Mass. 775, 780-81 (1979), but not appealable under the Federal Court's collateral order doctrine. *See Richardson-Merrell Inc. v. Koller*, 472 U.S. 424, 426 (1985) (order disqualifying counsel in civil case is not immediately appealable under collateral order doctrine). Furthermore, the *Mohawk* court detailed options for clients to protect the attorney-client privilege in the absence of the collateral order doctrine, which include certification of a question or defying the disclosure order. *See Mohawk Indus.*, 558 U.S. at 110-112. Neither of these

options are available to the Trust Defendants, particularly the option to defy the order because Attorney Levin is the Trust Defendants' lawyer who denies an attorney-client relationship for the Purchase Agreement.

B. The Superior Court Failed to Apply the Correct Legal Standard That an Attorney-Client Relationship Exits if the Client Reasonably Believes Such a Relationship Exits.

At issue is whether the Trust Defendants had an attorney-client relationship with Attorney Levin from Spring 2012 to September 30, 2013 relating to the Purchase Agreement.[3] "An attorney-client relationship . . . [exists] when (1) a person seeks advice or assistance from an attorney, (2) the advice or assistance sought pertains to matters within the attorney's professional competence, and (3) the

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[3] The court's conclusion that a conflict prevented Attorney Levin from representing the Trust Defendants prior to the September 30, 2013 fire, but the same conflict did not bar Levin from representing the Trust Defendants after the fire cannot be reconciled given that the Trust Defendants sought legal advice from Attorney Levin after the fire concerning legal issues that may arise from the Purchase Agreement. (RA 336:22-337:14, 435:17-437:25.) The Masons and the Trust Defendants were just as conflicted after the fire as before: the Masons later sued the Trust Defendants for allegedly causing the fire. (RA 340:2-15.)

attorney expressly or impliedly agrees to give or actually gives the desired advice or assistance." *DeVaux v. Am. Home Assur. Co.*, 387 Mass. 814, 817–18 (1983).

The first two issues are not in dispute. The third prong of the test – whether Attorney Levin "expressly or impliedly agree[d]" to provide the Trust Defendants with legal advice – is in dispute. "[T]he question whether there was an attorney-client relationship depends on the reasonableness of the plaintiff's reliance." *DeVaux*, 387 Mass. at 819; *see also Cesso v. Todd*, 92 Mass. App. Ct. 131, 82 N.E.3d. 1074, 1080 (2017)(client's reasonable belief can form basis for attorney-client relationship). "Courts customarily determine the existence vel non of an attorney-client relationship by evaluating whether the putative client's belief that such a relationship existed was objectively reasonable under all the circumstances." *Max-Planck-Gesellschaft Zur Foerderung der Wissenschaften E.V. v. Wolf Greenfield & Sacks, PC*, 736 F. Supp. 2d 353, 360–61 (D. Mass. 2010)(quoting *F.D.I.C. v. Ogden Corp.*, 202 F.3d 454, 463 (1st Cir. 2000))(both applying Massachusetts law).

The court below failed to evaluate whether an attorney-client relationship existed based on the reasonableness of the Trust Defendants' belief of an attorney-client relationship. Rather, the court determined that it was impossible for Attorney Levin to represent both sides to a complex transaction, and, as a result, the Trust Defendants did not meet their burden of proving that Attorney Levin represented both the buyer (Trust) and seller (Masons) for the Purchase Agreement. (RA 435:17-437:25.) The court did not explain why an impermissible conflict for the lawyer means that there cannot be a reasonable belief by the client that he was their lawyer, particularly where there was a history of that lawyer representing conflicting sides in transactions. Courts in Massachusetts have found that an attorney-client relationship can exist between a lawyer and two parties having conflicting interests. *See Lawrence Sav. Bank v. Levenson*, 59 Mass. App. Ct. 699, 708 (2003)(law firm disputed representation of lender, Appeals Court affirmed jury finding that law firm represented lender and borrower, and law firm held liable to lender); *Meloche v. Stempler*, No. CIV. A. 02-00427B, 2008 WL 2875444, at *2 (Mass. Super. July

11, 2008)(upholding jury conclusion that lawyer represented both the buyer and seller).

The overwhelming evidence is that the Trust Defendants reasonably believed that Attorney Levin represented the Trust Defendants for the Purchase Agreement, even if it is accepted that Attorney Levin initially told the Trust Defendants he could not represent them (which the Trust Defendants dispute). Attorney Levin directly communicated with the Trust Defendants throughout the negotiations of the Purchase Agreement and its amendment. (RA 360:24-361:23, 454-469, Attorney Levin never communicated with the attorney listed as the Trust Defendants' attorney in the Purchase Agreement nor any other attorney representing the Trust Defendants. (RA 94 at ¶3, 176:5-19.) Attorney Levin's first two drafts of the Purchase Agreement were prepared in a form unacceptable to the Masons and thus must have been prepared on behalf of the Trust Defendants to reflect the Trust Defendants' desired terms. (RA 185:11-188:21; 188:3-11, 189:10-18, 190:24-191:25.) Attorney Levin sent drafts of the Purchase Agreement to the Trust Defendants with the expectation that the Trust Defendants would ask him questions, and they did. (RA

195:4-196:6, 199:25-200:4, 246:23-247:1, 436:21-437:6.) Attorney Levin prepared a power of attorney for the Trust Defendants in connection with the Purchase Agreement. (RA 510-512.) Attorney Levin billed the Trust Defendants for half of his time to prepare the Purchase Agreement. (RA 513.) Attorney Levin provided Martin with advice about due diligence deadlines after execution of the Purchase Agreement. (RA 514-515.) Attorney Levin communicated directly with Martin for the amendment to the Purchase Agreement and Attorney Levin made comments and asked questions during discussions with the Trust Defendants concerning the terms of the amendment to the Purchase Agreement. (RA 182:13-184:12, 195:4-196:6, 202:12-203:5, 205:13-24, 215:6-216:4, 218:2-22, 246:23-247:1, 341:9-342:1, 365:11-366:1.) Under these circumstances, a finding that the Trust Defendants did not prove an attorney-client relationship is clearly erroneous and fails to account for the Trust Defendants' reasonable belief that Attorney Levin was their lawyer.

C. The Superior Court Committed Manifest Error Given Attorney Levin's Admissions and the Trust Defendants Evidence of an Attorney-Client Relationship.

Even if the court was correct to disregard the

Trust Defendants' reasonable belief of an attorney-client relationship, and the law is certainly to the contrary, it was still manifest error to determine that no attorney-client relationship existed between the Trust Defendants and Attorney Levin in the face of overwhelming evidence demonstrating such a relationship.

Courts look at several factors to determine whether an attorney agreed to represent a prospective client. *In Lawrence Savings Bank*, the Appeals Court affirmed a jury's finding of an attorney-client relationship (disputed by the attorney/law firm) where the attorney ordinarily represented the alleged client in matters similar to the transaction at issue, the attorney directly communicated with the alleged client about the transaction at issue, the attorney prepared all of the transaction documents, the attorney made sure that all relevant documents were signed and recorded, and the attorney billed the alleged client for the transaction. 59 Mass. App. Ct. at 708. In *Meloche*, Superior Court Judge Kern upheld a jury's conclusion of an attorney-client relationship (disputed by the attorney) because the alleged client contacted the attorney for legal work, the attorney

prepared the purchase and sale agreement at issue, the attorney prepared the power of attorney for the alleged client, and the attorney charged the alleged client legal fees. 2008 WL 2875444, at *2. *See also*, *Williams v. Ely*, 423 Mass. 467, 476 (1996)(billing of legal fees support the finding of an attorney-client relationship). *Cf. Symmons v. O'Keeffe*, 419 Mass. 288, 300 (1995)(no attorney-client relationship when the attorney never was asked to represent the alleged client and the attorney never billed the alleged client). These cases stand on all fours with the circumstances presented by the Trust Defendants here. There is certainly no legal authority to support the lower court's conclusion that no attorney-client privilege can exist because the attorney was representing a party with a conflicting interest in the same transaction.

V. CONCLUSION

For the foregoing reasons, this Court should vacate the Superior Court's Order denying, in part, the Trust Defendants' Motion for a Protective Order and order the Superior Court to grant Appellants' Motion in full.

LEO MARTIN, SY MARCUS and
ELLEN REA MARCUS, as she is
Trustee of the
GROSSMAN MUNROE TRUST,

By their attorneys,

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Dated: October 31, 2017

RULE 16(k) CERTIFICATION

I, Gregory M. Boucher, counsel for LEO MARTIN, SY MARCUS and ELLEN REA MARCUS, as she is Trustee of the GROSSMAN MUNROE TRUST, certify pursuant to Mass. R. A. P. 16(k) that this brief complies with all rules that pertain to filing of briefs.

/s/ Gregory M. Boucher
Gregory M. Boucher

CERTIFICATE OF SERVICE

I, Gregory M. Boucher, counsel for LEO MARTIN, SY MARCUS and ELLEN REA MARCUS, as she is Trustee of the GROSSMAN MUNROE TRUST, certify that I caused copies of this Brief of Appellants and Appendix to be served by email, via eFileMA, and First Class U.S. Mail upon David V. Lawler, counsel for Appellees Jay Patel and Dipika, Inc., on October 31, 2017.

/s/ Gregory M. Boucher
Gregory M. Boucher

ADDENDUM

CLERK'S NOTICE	DOCKET NUMBER 1582CV01654	Trial Court of Massachusetts The Superior Court
CASE NAME: Jay Patel et al vs. Leo Martin et al		Walter F. Timilty, Clerk of Courts
TO: Zachary W. Berk, Esq. Saul Ewing LLP 131 Dartmouth St Suite 501 Boston, MA 02116		COURT NAME & ADDRESS Norfolk County Superior Court 650 High Street Dedham, MA 02026

You are hereby notified that on 06/30/2017 the following entry was made on the above referenced docket:

Endorsement on motion for protective order (#28.0): Other action taken
After evidentiary hearing, Motion allowed in part and denied in part. I find and rule that there was an attorney-client relationship between Atty. David Levin and defendants after the fire on September 30, 2013 as regards insurance claims or third party claims. Plaintiff has not proved that Atty. Levin was acting as defendants' attorney in connection with the purchase of the Masonic Temple property. I find that Attorney Levin was serving as the attorney for the Masonic Temple Association such that communications, writing, meetings or other contacts with defendants prior to the date of the fire are not protected by the attorney-client privilege. This judge will retain jurisdiction over issues that may arise with regard to discovery (document requests, depositions and the like) to the extent a privilege claim is asserted. (dated 6/30/17)

DATE ISSUED	ASSOCIATE JUSTICE/ ASSISTANT CLERK	SESSION PHONE#
06/30/2017	Hon. Jeffrey A Locke	

and the testimony of -- of Mr. Marcus where he indicated previous -- subsequently that, you know, he was aware that Attorney Levin was involved with -- with -- with both parties, so there was an awareness on his behalf.

He is a very sophisticated business person. The testimony he owns 400 some odd commercial residential units and X amount of square feet of commercial space.

You know, this is a -- you know, this is a -- not a -- certainly where Mr. Marcus and Mr. Martin are concerned, they are very sophisticated. I believe Attorney Levin testified to that effect. And I believe the evidence is clear to that effect, and that the attorney privilege with respect to -- certainly with respect to anything between those parties is -- is waived -- not waived. It never existed.

And with what they've produced, is waived, and that's what we're looking for, Your Honor.

THE COURT: All right. Having considered all of the evidence, I find that there was an attorney-client relationship between Mr. Levin, Mr. Martin, and Mr. Marcus as it related to potential liability following the fire on September 30, such that any inquiries made or information provided by Mr. Martin and Mr. Marcus to Mr. Levin, any advice provided by Mr. Levin, as it relates to claims for either anticipated claims by subrogated parties or by third parties, most particularly by Mr. Patel, are protected by the

attorney-client relationship and by the attorney-client privilege.

The more difficult issue is Mr. Levin's role and involvement between the time that an offer to purchase was formulated and the fire in September -- on September 30.

I do not accept that Mr. Levin -- well, I do not accept that the sellers and the buyers in this case, sellers being the Masonic Association, the buyers being Mr. Marcus and Mr. Martin as his agent, shared a common interest. They did, the common interest being the sale of the property and transfer of the property and development of the property, but not such that their interests were aligned with regard to this transaction.

As Mr. Lawler points out, a purchase and sale agreement generally is designed to protect the rights and enforce the obligations of a buyer and a seller, which almost by definition are antagonistic one to the other.

And in a transaction of this complexity, it seems impossible that a single attorney could represent both sides in a very complex and sophisticated real estate transaction.

I accept the testimony as I've heard it that there was a longstanding relationship between Mr. Levin and Mr. Marcus and his various ventures that extended perhaps up to 25 years and involved countless real estate transactions whether purchases, sales, leases, or other activities where Mr. Levin served

essentially as in-house counsel for Mr. Marcus and his various holdings. And I acknowledge that Mr. Martin was the agent of Mr. Marcus for those events, and that any communications by Mr. Martin as to all of those real estate transactions in the past would fall under the attorney-client umbrella that Mr. Levin had with Mr. Marcus and his entities.

That does not mean in this particular transaction, however, that Mr. Martin necessarily represented -- I'm sorry -- that Mr. Levin necessarily represented Mr. Marcus and Mr. Martin.

A party asserting a privilege has the burden of proving that that privilege exists. I don't find in this case that the plaintiff has proved to my satisfaction that Mr. Levin acted as the attorney for Mr. Marcus and Mr. Martin with regard to the negotiations leading to the signing of a P and S or with regard to negotiations leading to an extension of that P and S.

I'm not satisfied that there is an attorney-client relationship between Mr. Marcus and his agent, Martin, and Attorney Levin prior to September 30, that being the date of the fire.

Therefore, I don't find that there is a privilege applying to communications between Mr. Marcus or Mr. Martin and Mr. Levin as it related to this transaction prior to the fire.